ILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 665

CLAUDE MACK

Petitioner

vs.

LEHIGH VALLEY RAILROAD COMPANY,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

Allen & Brett Co., 17 Thirteenth Street, Newark, N. J.—Market 3-8111

TABLE OF CONTENTS

	PAGE
(a) Opinions Below and Statement of Nomenclature To Be Used in this Brief	1
(b) Statute Involved	2
(c) Questions Presented	3
(d) Counter-Statement of the Case	3
(1) Nature of the Proceedings	3
(2) Statement of Facts	6
ARGUMENT:	
(e) Answer to Petitioner's Point I	20
(f) Answer to Petitioner's Point II	21
(g) Answer to Petitioner's Point III	24
(h) Reasons Why Petition Should Be Denied	27
(i) Conclusion	28

Cases Cited

Blackner v. McDermott, 176 F. 2d 498 (C. A. Wyo., 1949) 20

Boston Ins. Co. v. Read, 166 F. 2d 551 (C. A. Okl., 1948) 20

Egan v. Erie R. Co., 29 N. J. 243, 148 A. 2d 830 ..... 2, 3, 21-24, 27, 28

Erie v. Tompkins, 302 U. S. 671, 58 S. Ct. 50 (1938) 27

Foreman Co. v. Great Lakes Pipe Line, 274 F. 2d 61 (C. A. Mo., 1960) 20

Friedl v. Kervick, Supreme Court of New Jersey (A-149, not yet officially reported) decided January 23, 1961 23

PAGE

King v. Patrylow, 15 N. J. Super. 429, 83 A. 2d 639 (App. Div., 1941) 22

Staub v. Public Service Railway Co., 97 N. J. L. 297, 117 Atl. 48 (E. & A., 1922) 21

Wegiel v. Hogan, 28 N. J. Super. 144, 100 A. 2d 349 (App. Div., 1953) 22

Statute Cited

N.J.S.A. 48:12-152 ..... 2, 5, 16, 24

Federal Rules of Civil Procedure

Rule 19 27

Rule 41b 4

Rule 52 20

Rule 52a 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 668

CLAUDE MACK,

Petitioner,

vs.

LEHIGH VALLEY RAILROAD COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

(a)

Opinions Below and Statement of Nomenclature To be Used in this Brief

The opinion of the trial court (WORTENDYKE, U. S. D. J. of the United States District Court for the District of New Jersey) is printed at p. 112a, l. 28 of the "appendix to appellant's brief" filed in the United States Court of Appeals for the Third Circuit, and certified as part of the record in this Court. That appendix will hereinafter be referred to as "Pl's App." (white cover). Respondent also filed an appendix to its brief in the Court of Appeals, which also is part of the record in this Court. It bears the title "Ap-

pendix to Appellee's Brief" (blue cover). It will be referred to hereinafter as "Def's App." The opinion of the trial court is also set out at length in our Statement of the Case in this brief.

The opinion of the Court of Appeals is reported in 283 F(2) 405 (Adv. Sheet of Dec. 26, 1960).

(b)

Statute Involved

One of the main reasons the trial judge sitting without a jury found for defendant was his acceptance of the defense based on the following New Jersey statute, which will be found in N.J.S.A. 48:12-152:

> "48:12-152: It shall not be lawful for any person other than those connected with or employed upon the railroad to walk along the tracks of any railroad except when the same shall be laid upon a public highway.
>
> Any person injured by an engine or car while walking, standing or playing on a railroad or by jumping on or off a car while in motion shall be deemed to have contributed to the injury sustained and shall not recover therefor any damages from the company owning or operating the railroad. This section shall not apply to the crossing of a railroad by a person at any lawful public or private crossing."

The history of this statute is referred to as follows by the New Jersey Supreme Court in *Egan* v. *Erie R. Co.*, 29 N. J. 243 at 247 (1959):

> "This statute had its origin in 1869. L. 1869, c. 285, p. 806. It was enacted in virtually the above language as part of the General Railroad Law in 1903, L. 1903, c. 257, Sec. 55, and re-enacted in its present form in the general revision of the New Jersey statutes in 1937."

In the *Egan* case the foregoing statute was attacked on various grounds, including a contention of unconstitutionality. The New Jersey Supreme Court unanimously upheld the validity of the statute.

(c)

Questions Presented

Petitioner has set forth at page 2 of his petition three questions which he presents to the Court for consideration on this application. We submit there is a further question which is necessarily inherent in all applications for *certiorari*, and that is whether this is a proper case for granting the writ.

Unfortunately, in presenting his questions to the Court petitioner has made certain factual statements which we submit are unjustified by the evidence or by the findings of the trial judge sitting without a jury. These unjustifiable factual statements will be pointed out in our counter-statement of the case.

(d)

Counter-Statement of the Case

It is our view that petitioner's statement of the case is inadequate and in some instances misleading and we, therefore, set forth the following statement of the case.

(1) Nature of the Proceedings

The petition for *certiorari* brings before this Court for consideration a judgment of the United States Court of Appeals for the Third Circuit (p. 3a of App. to Pet.) affirming a judgment (Pl's App. 122a) against plaintiff (petitioner) and in favor of defendant (respondent) in a suit brought for personal injuries. The trial was before WORTENDYKE, U. S. D. J. without a jury. At the close of the plaintiff's case, defendant moved pursuant to Rule

* The reference to rules in this Brief will be to the Federal Rules of Civil Procedure, unless otherwise noted.

41b for an involuntary dismissal. That motion was granted and since the trial judge dictated his decision in the record (Pl's App. 112a) and the findings of fact and conclusions of law appear therein, the procedure of Rule 52a was followed as required by Rule 41b and no separate findings of fact and conclusions of law were filed.

Plaintiff's complaint is in two counts. The first alleges that on September 6, 1958 he went onto the tracks and right of way of defendant, a railroad corporation, and through its negligence was struck by a locomotive and injured (Pl's App. 4a (Paras. 5 and 6)). In paragraph 7 of the first count (Pl's App. 5a) it is stated:

> "7. The negligence of the defendant consisted in wilfully, wantonly and with reckless disregard of the rights and safety of persons on its tracks and right-of-way and, in particular, plaintiff, operating its engine in such a manner as to suddenly and without warning drive its engine and train of cars along the tracks without giving notice of its approach by bell, whistle or otherwise, and striking the plaintiff."

The second count (Pl's App. 5a) repeats the first count and alleges.

> "2. On the aforesaid 6th day of September, 1958, plaintiff was lying so that a portion of his right leg was on the rail or track of the said defendant's railroad at a point about 250 feet east of Jersey Avenue, in the City of Jersey City, County of Hudson and State of New Jersey.
>
> 3. At the point where plaintiff was so lying on the said tracks, the said tracks were free from curves, grades or obstructions of any kind that would conceal the view of any portion thereof from the engineer and other employees on a train passing along said tracks for a long distance and the said tracks were constructed in a straight line for a great distance."

The defendant in its answer (Pl's App. 8a) denied negligence of any kind, pleaded contributory negligence and assumption of the risk and in its third defense stated plaintiff was barred from recovery by R.S. (N.J.) 48:12-152, which we have already set forth under the heading, "Statute Involved:"

At the pretrial conference, the contentions of plaintiff were stated as follows:

> "The plaintiff alleges that while he was walking along a foot path which extended from Jersey Avenue to a point along the edge of Canal Street, roughly paralleling the single track of the defendant, he suffered a black-out which caused him to fall into unconsciousness, with one of his legs upon the rail of the track, and that while in this position and condition, his leg was severed by the approaching train.
>
> He charges that his injuries were inflicted in consequence of negligence chargeable to the defendant in that it failed to sound the required warning by bell or whistle and failed to maintain a look-out appropriate to the circumstances and conditions surrounding the location of the occurrence.
>
> In his second count the plaintiff charges that the defendant, through its agents and servants, were guilty of wilful and wanton wrongdoing in continuing to approach the plaintiff when his position and proximity to the track indicated his helplessness and vulnerability.
>
> Plaintiff charges that although the foot path referred to was on railroad property, it had been customarily employed by members of the public generally with the knowledge of the railroad as a means of access between Jersey Avenue and other streets in the area." (Pl's App. 9a)

The contentions of the defendant at the pretrial conference were as stated in its answer (Pl's App. 10a).

Plaintiff appealed from the final judgment entered (Pl's App. 123a) to the Court of Appeals for the Third Circuit and that Court affirmed the judgment (App. to Petition p. 3a).

(2) Statement of Facts

On September 6, 1958, plaintiff was discovered lying near the defendant's track which parallels Canal Street in Jersey City. He was lying approximately 200 feet* east of Jersey Avenue with his leg off. The severed leg was between the two rails. He was "probably about 3 or 4 feet away from the track" (Pl's App. 37a). Plaintiff has no recollection as to how he came to be on the track of defendant where the accident occurred (Def't App. 73b). He recalls coming on the property of defendant approximately 900 feet east of the place of accident (Def's App. 83b). He admits he was intoxicated when he came on to defendant's property (Deft's App. 86b). There is no proof in the case as to how plaintiff managed to get from the point 900 feet east of the place of accident to that place (Pl's App 104a to Pl's App. 177a) except that plaintiff told the police officers he remembered sitting on the track at the place of accident prior thereto (Deft's App. 29b). Defendant's crew operated a train on the track where plaintiff's leg was found at or near the time of the accident. The Court found as a fact that a path along the track and other railroad property (not tracks) near Jersey Avenue were frequently used by the public (Pl's App. 114a to 115a, 113a) but the place on the track where the accident happened was neither a public nor a private crossing (Pl's App. 118a).

---

* The estimate of 200 feet east of Jersey Avenue was made by Jersey City Police Officer Fortunato (Pl's App. 42a), and his estimate of 200 feet east was accepted by plaintiff's attorney (Pl's App. 101a).

The Court's oral opinion on the granting of judgment fo defendant follows (Pl's App. 112a):

"The Court: So that I think I have reviewed wit you the five or six specific contentions that you hav made with respect to the evidence. This is a ver difficult case for me to decide in view of the natur sympathy which I feel for the plaintiff in this cas in view of the nature of his injury and the consequence As I have already indicated I followed the evidenc in this case very closely. I have taken careful note and I have reviewed that evidence. I have reviewe all of the cases cited by counsel for the respectiv parties. As a Judge I owe it to each litigant to b completely impartial and to be guided by the law a I understand it, and I must accept that responsibilit and in the discharge of that responsibility I mus grant the motion.

In this case the Court's jurisdiction is predicate upon diversity. The occurrence complained of too place in New Jersey. The law of New Jersey mu therefore (386) govern the rights and obligatiey mu

therefore (386) govern the rights and obligations o

the parties under the principle of Erie Railroad vs Tompkins. The complaint alleges here that an area along the tracks concededly owned and maintained by the defendant railroad in the vicinity of Jersey Avenue and Canal Street in Jersey City had been used by the general public to the knowledge of the railroad without objection as a passageway. Indeed, the line o the railroad upon which the occurrence here complained of took place followed the bed of what some of us who are familiar with Jersey City, knew as the Old Morris Canal. Indeed in the photographs, some of the photo graphs which have been admitted in evidence, there ap pears paralleling this track, near to which the plaintif was found after the regretable occurrence, a footpath which has been referred to as a towpath, and evidently

followed the course of the toe path that was used when the present railroad right of way was the bed of the canal.

The complaint goes on to allege that on the date of the occurrence, September 6, 1958, while the plaintiff was using that passageway, that is to say, the passageway which he says the public had been using without let or hinderance to the knowledge of the defendant, he was struck by the defendant's locomotive. He specifies that that occurrence resulted from wilful, wanton and (387) reckless disregard of his safety by the defendant in operating its engine suddenly and without warning, without giving notice by bell or whistle.

The complaint does not relate the occurence complained of as far as location is concerned to any public or private crossing as such.

As a second cause of action in the complaint the plaintiff alleges that he was lying with a portion of his right leg on a portion of the rail, not walking as he stated in his first count, about 250 feet east of Jersey Avenue, and that while he was so lying and wholly ignorant of the approach of the train, the defendant with wanton and reckless disregard for his safety, ran the train upon his leg. Despite the fact that in the exercise of proper care it could have knowledge of plaintiff's position, says the second count of the complaint.

At pretrial, however, apparently plaintiff adopted the theory, or made the stand through his attorney that while he was walking along the footpath to which I have referred, he suffered a blackout which caused him to fall into an unconsciousness with one of his legs upon the rail of the track, and that while in that position and condition his leg was severed by the ap-

proaching train. He again contended that no warning by bell or whistle was given, (388) and that the defendant failed to maintain a lookout appropriate to the conditions surrounding the place where the accident occurred.

I take it, Mr. Rassner, that that latter theory is what you rely heavily upon in this argument.

Then, of course, he charged that the defendant was guilty of wilful and wanton wrongdoing in continuing to approach him with its train when his position and helplessness should have been disclosed to the representatives of the railroad.

Then he further contended at the pretrial conference that this footpath was generally used by the public, as we have previously indicated, and as I find as a fact here.

Now, the railroad line where this occurrence took place runs generally east and west. We are interested in the light of the testimony, in that portion of its extent which lies between Warren Street on the east, which is near the north or Hudson River, and Pacific Avenue on the extreme west. The map is in evidence and indicates the course and location or the track or tracks, the yards, and the adjacent properties, public streets, et cetera. The strip of land which I find was used by the public, albeit, apparently owned by the railroad as far as any evidence is concerned—I should say rather that there (389) is no evidence with respect to its ownership—however, assuming that it was owned by the railroad, that is to say, the grass plot, where these individuals were accustomed to lie around and enjoy themselves, varies in width between the northerly rail of the track and the southerly curbline of Canal Street, anywhere from ten feet, approximately at its narrowest point to, I think, forty or fifty feet at its maximum.

Now, on this Saturday morning the plaintiff, who had not slept the previous night which separated Thursday from Friday because he worked all day Friday and had not slept Friday night, admittedly consumed numerous drinks of whiskey the previous evening during the night and following his breakfast that morning. In fact, I think he used double shots. The Court will not refer to any possibility of its taking judicial notice of the effect of alcohol on one's recollection. Such may or may not be known to counsel. But, in any event, after he had his breakfast at home that morning, where he had gone following his return from Elkton, Maryland, where he had an automobile accident, he took a bus with the intention of going to some place by way of Sussex Street which is east of the area with which we are immediately concerned, and to the Court's knowledge, as a former resident of Jersey City, (390) is east of Grove Street. He said he alighted from the bus at the intersection of Grand Street, which roughly parallels Canal Street and lies to the north thereof. He got off at Jersey Avenue and Grand Street and then walked east, and apparently in doing so traversed Barrow Street and came to the corner of Grove Street which was the second street to the east of Jersey Avenue. At that point Canal Street and Grand Street come more closely together than they are back at the intersection of Jersey Avenue with each of those streets. He got off the bus, and if he were going on to Sussex Avenue, he would have continued on Grand Street east, or would have come down to Canal Street and continued east, but he says he got to the corner of Grove Street and Canal Street and he stopped to light a cigarette, and that is the last thing he remembered until he came to at a point near the marking made on the map by one of the police officers, which is concededly approximately 200 feet to the east of Jersey Avenue, and

he was aware that the wheel of a boxcar of the defendant's railroad had passed over his leg, he rolled or dragged himself from off the rail and out into the grass plot lying to the north of it and continuing to call for help. He was ultimately discovered by an unknown person who reported the situation to a member of (391) the train crew, I believe the conductor. He was ultimately removed to the hospital.

Now, assuming for the moment that there was an implied invitation or a license by reason of the custom and practice of members of the public to make use of this grass plot between the track and Canal Street for its use for play, traversing on foot, lying around, drinking, et cetera, realizing on a motion of this kind the Court must assume as true all evidence and inferences therefrom most favorable to the plaintiff, and even taking into consideration the contents of the story given by the plaintiff at the hospital to one or both of the police detectives, we have an utter absence of any evidence or any basis whatsoever for inferences as to how Mr. Mack got from the corner of Grove Street and Canal Street to the point at which the wheel of the railroad ran over his thigh. We can speculate and guess that he might have been riding on a car and had jumped off and fallen with his leg under the wheel; that he might have laid himself down to rest and in his sleep rolled over and thrown his leg over the rail; that he might have sat upon the rail. Such a variety of speculative guesses cannot serve as evidence particularly when we recognize that the burden of proof, not only of a breach of duty in this case, but a causal relationship between (392) that breach and the injury, is cast upon the plaintiff.

But let us assume by reason of its knowledge of practice of members of the public in all stages of sobriety to go and be upon this strip of land along the

railroad track that the railroad was under a duty to avoid wilful and wanton wrongdoing causal of injury to any of those persons, obviously, unless the defendant railroad through its agents, servants or employees knew or had reasonable cause to believe that this plaintiff was on the rail of the track as distinguished from the grass plot where all these other people so frequently congregated, there could be no basis in my opinion for a finding that the railroad was guilty of wilful or wanton wrongdoing.

But we are in a different posture here, gentlemen, because the Legislature of this State has seen fit to adopt what is now in the New Jersey Revised Statutes, 48:12-152, and so far as it appears to be applicable here it provides as follows:

It shall not be lawful for any person other than those connected with or employed upon the railroad to walk along the tracks of any railroad except when the same shall be laid upon a public highway. Any person injured by an engine or car while walking, standing or playing on a railroad * * * shall be deemed to have (393) contributed to the injury sustained and shall not recover therefor any damages from the company owning or operating the railroad. This section shall not apply to the crossing of a railroad by a person at any lawful public or private crossing.

I can find in this case no basis for inference that the plaintiff at or preceding the infliction of the injury upon him was crossing the railroad of the defendant at a lawful public or private crossing.

Now, this very Court through its former Chief Judge, who now has become a member of the Court of Appeals, Judge Forman, for whose ability and experience I personally have the highest respect and admiration, was affirmed by the same Circuit Court in dismiss-

ing on motion a complaint which alleged that three little children were walking along a track or tracks on which a train of the Pennsylvania Railroad Company was approaching, and I believe at the same time a train of another railroad company was approaching in the opposite direction. It was alleged that the defendant Pennsylvania, failed to bring its train to a stop and was otherwise negligent, and as a result thereof, inflicted injury upon one of these children. It was conceded, and I believe alleged in the complaint, that the child in question was a trespasser upon the (394) right of way. In that case, which was Kowaleski vs. Pennsylvania Railroad Company, and as reported on appeal affirmed Judge FORMAN, and appears in 103 Fed. (2d) 827, this very statute was construed and held to apply to all persons alike without distinction as to age or physical or mental condition.

We all, of course, are familiar with the earlier decision in Erie Railroad Company vs. Hilt, 274 U. S. 97, referred to by counsel in his argument on this motion, where the child was reaching with his foot for a marble which had rolled under a railroad car, which backed and amputated his leg, or so badly injuried it as to result in amputation. That case went to the United States Supreme Court, and at page 101 of the opinion Justice HOLMES said, 'While the land owners cannot intentionally injure or lay traps for a person coming upon his premises without license, he is not bound to provide for the trespasser's safety from other undisclosed dangers or to interrupt his own otherwise lawful occupations to provide for the chance that someone may be unlawfully there.'

The Hilt case was cited and followed in a later case of Erie Railroad Company vs. DuPlak, 286 U. S. 440, where a five-year-old boy lost his leg while playing on a railroad bridge where railroad cars were being drilled

back and (395) forth, and in the particular operation which inflicted the injury a group of cars was being pushed by the engine into standing cars in the immediate vicinity of the child and the standing cars were driven over the child's leg. Following the interpretation in the Hilt case of the Jersey statute, Justice SUTHERLAND in the course of his opinion, said, 'It is unnecessary to discuss the question of negligence because of the provisions of the statute as interpreted by the highest court of the State.'

In Best vs. District of Columbia, in 291 U. S. 411, that Hilt case was distinguished. That case, if my recollection serves me correctly, a child was playing on a pier belonging to the District of Columbia and there was an unguarded hole on the pier surface. The child fell in and was drowned. But in discussing the Hilt case, and in distinguishing it, the Court pointed out that in the Hilt case and in the DuPlak it was the Jersey statute which precluded recovery. Indeed, that District of Columbia case and the argument of counsel on appeal, the contentions made by the plaintiff in the case presently before me were offered in support of the principle, which was ultimately recognized on appeal, that where there was an inquired* invitation or even a trespass or a license to allow of this open, unguarded hole in an area where (396) children were known to trespass and play suffice to allow a recovery, but only because the Jersey statute or its equivalent was not involved.

Now, more recent and most completely abreast of the modern trend of our courts to endeavor to make available compensation for human injury resulting from the wrongdoing of another, has passed upon this-

*The word "inquired" appears in the transcript, but we believe the word should be "implied."

statute in the Egan case. It is a long opinion. All of the law, apparently including the case to which I have referred, is collected and discussed. The case was decided as recently as last Fall, I believe. No, last March, just a year ago, decided March 2, 1959. Certainly it is a current decision. In that case the little girl was only seven years of age. She had climbed over a fence which separated the railroad track from the housing development in which she resided in the City of Hoboken. She had been riding on the train. Indeed in the language of Justice PROCTOR, the employees of the defendant company had prior knowledge that children were accustomed to playing upon the tracks in the vicinity of the accident and had on occasions chased them; a case, it seems to me, very much stronger in favor of a right of recovery from the plaintiff than the one with which we are here concerned. But in any event, the highest court in this State still construes this old statute which our Legislature has seen fit to keep on the statute books as absolving a railroad company from a duty to a trespasser.

In the further language of Justice PROCTOR at page 248, we read, 'The effect of the statute is to absolve a railroad company from a duty to a trespasser. Although a trespasser is deemed to have contributed to an injury sustained as a matter of law, the statute does not restrict it to that proposition,' as it goes on to say that a trespasser who sustains an injury in the manner specified 'shall not recover therefor any damages from the company owning or operating the railroad.'

In that case there was an allegation or a contention that the railroad company was guilty of wanton negligence in failing to have a watchman present at the scene, and the Court held 'Even ignoring the fact that in these circumstances a railroad is ordinarily under

no duty to provide watchmen, its failure to do so falls far short of the standard required for a finding of wilful or wanton conduct.'

It is therefore with regret which I have expressed, that I am compelled to grant the motion. Such will be the order." (Pl's App. 112a)

We wish to make the following comment with respect to plaintiff's "Questions Presented." In quoting the pertinent statute (N.J.R.S. 48:12-152 at p. 2 of the petition) there is an asterisk indicating an omission. The words omitted are "or by jumping on or off a car while in motion." Those words have some relevance, because as pointed out by the Court in petitioner's appendix (p. 117a):

> "* * * we have an utter absence of any evidence or any basis whatsoever for inference as to how Mr. Mack got from the corner of Grove Street *and Canal* Street to the point at which the wheel of the railroad ran over his thigh. We can stipulate and guess *that he might have been riding on a car and had jumped off* and fallen with his leg under the wheel; that he might have laid himself down to rest and in his sleep rolled over and thrown his leg over the rail; that he might have sat upon the rail. Such a variety of speculative guesses cannot serve as evidence particularly when we recognize that the burden of proof, not only of a breach of duty in this case, but a causal relationship between (392) that breach and the injury, is cast upon the plaintiff."

At page 2 of the petition, the following statement appears:

> "* * * grant immunity from liability to a railroad which amputates the leg of a helplessly drunk person.

Emphasis ours throughout.

lying with one leg across the track, in full view of the train crew, in broad daylight, at an area where the Trial Court accepted as true the fact that the railroad had 'knowledge of practice of members of the public in all stages of sobriety to go and be upon this strip of land along the railroad track' * * * (117a), and where the Trial Court accepted as true 'that there was an implied invitation or a license by reason of the custom and practice of members of the public to make use of this grass plot between the track and Canal Street for its use for play, traversing on foot, lying around, drinking, et cetera * * *' (116a, 117a)!"

While it is true the petitioner's leg was amputated by the train, it is also a fact as the trial court points out, that there is no proof as to exactly how the accident happened, and therefore the statement, "amputates the leg of a helplessly drunk person, *lying with one leg across the track in full view of the train crew*" is not justified. Furthermore, the following statements at page 2 of the petition tend to be misleading: "*At an area* where the Trial Court accepted as true the fact that the railroad had 'knowledge of practice of members of the public in all stages of sobriety to go and be upon this strip of land along the railroad track * * *' and where the Trial Court accepted as true 'that there was an implied invitation or a license by reason of the custom and practice of members of the public to make use of this grass plot between the track and Canal Street for its use for play, traversing on foot, lying around, drinking, et cetera.' We say these statements tend to be misleading because the trial court was not referring to the *track* where the petitioner's leg was severed, but to an area in the vicinity of the track. The trial court said at p. 117a (Pl's App.):

> "But let us assume by reason of its knowledge of practice of members of the public in all stages of sobriety to go and be upon this strip of land along the railroad track that the railroad was under a duty to

avoid wilful and wanton wrongdoing causal of injury to any of those persons, obviously, *unless the defendant railroad through its agents, servants or employees knew or had reasonable cause to believe that this plaintiff was on the rail of the track as distinguished from the grass plot* where all these other people so frequently congregated, there could be no basis in my opinion for a finding that the railroad was guilty of wilful or wanton wrongdoing."

All Judge WORTENDYKE said with respect to the area is that the public did use the path running parallel with the rails about 2 feet from the nearest rail and the grass area near the Jersey Avenue crossing. He said, "I find that to be a fact in this case. I mean the grass area (Pl's App. 109a). He also said:

> "Then he further contended at the pretrial conference that this footpath was generally used by the public, as we have previously indicated, and as I find as a fact here.' (Pl's App. 114a)."

Judge WORTENDYKE also said:

> "I can find in this case no basis for inference that the plaintiff at or preceding the infliction of the injury upon him was crossing the railroad of the defendant at a lawful, public or private crossing." (Pl's App. 118a).

The following statement in the second question presented (p. 2 of the petition), is from our review of the record unjustified. Petitioner says: "Without protest by the railroad and without any indication that the railroad had any objection to the public using said property." We find no evidence to support that statement in the record.

The factual statements in question No. 3 are not supported by the record. While it is true that there were move-

ments of the train on the morning in question, and we do not dispute that the train severed plaintiff's leg, the fact is that there is no proof as to just how the accident happened, and there is no sound reason to assume that it happened during a specific movement of the train such as described by petitioner in question No. 3.

We would like to say parenthetically that we do not conceive that any of these factual inaccuracies in the petition are of any really great importance on the fundamental question as to whether this Court should grant *certiorari*. Frankly, as we shall try to demonstrate in this brief, we feel that this clearly is not a proper case for *certiorari* even if all of plaintiff's factual statements were accepted. However, we do feel that we have a duty both to the Court and to our client to do our best to see to it that a fair and accurate statement of the facts is before the Court at the time of its decision.

There are unjustifiable or misleading factual allegations in that part of the petition entitled "Statement" (p. 4). However, so long as it is kept in mind that there is no proof as to exactly how this accident happened, plaintiff's allegations in the third paragraph of his statement (p. 4) are harmless. We do not dispute that there were movements of the train on the morning in question, but nevertheless, as to what circumstances brought about plaintiff's injury, the record is silent.

Paragraph 4 of petitioner's Statement contains an assumption which is not justified by the record, and the same is true of paragraph 5. The statements following "The trial court accepted as true" at page 5 of the petition, are misleading, as already pointed out.

ARGUMENT

(e)

Answer to Petitioner's Point I

We submit it is a complete answer to Point I to remark that we have already demonstrated that the trial court made a clear distinction between the area near the track and the track itself, and there was no finding by him of any invitation to traverse the track in any manner. The findings of the Court on this point have been stated earlier in this brief and will not be repeated here. We submit it should also be kept in mind that the Judge was sitting in this case without a jury, and his fact findings will not be set aside unless clearly erroneous. See Rule 52 and also: *Blackner v. McDermott*, 176 F. 2d 498 (C.A. Wyo. 1949); *Boston Ins. Co. v. Read*, 166 F. 2d 551 (C.A. Okl. 1948) and *Foreman Co. v. Great Lakes Pipe Line*, 274 F. 2d 61 (C.A. Mo. 1960).

At the risk of overstating the obvious, it is certainly not the practice of this Court, in any event, to grant *certiorari* merely to determine whether the trial court's factual conclusion as to petitioner's status was a proper finding of fact.

However, we believe it is pertinent to call the court's attention to the most thorough ventilation of plaintiff's legal and factual contentions by the trial judge, which appears at p. 98a, *et seq.* of Pl's App., and the most thorough manner in which the Court considered this case is also demonstrated by a reading of the Court's comments during the motion of defendant for judgment, which appears in 94b, *et seq.* of Def's App. We have no hesitation in saying that the manner in which the trial judge approached a solution of this case is a model of the judicial process in action.

For the foregoing reasons we submit respectfully there is no merit to plaintiff's contention that he was invited by defendant onto its tracks, and Point I of the petition demonstrates no valid basis for granting *certiorari*.

(f)

Answer to Petitioner's Point II

Here again we have an unwarranted assumption by petitioner that there is proof in the case as to exactly how the accident happened.

The trial judge in rejecting petitioner's contention that defendant was guilty of willful and wanton conduct states his reasons at p. 117a of plaintiff's appendix, which we have already quoted. On this issue also the trial court made his factual finding that the defendant was not guilty of willful and wanton conduct, and his finding must be respected unless clearly erroneous. The Court of Appeals made a specific finding that there was no proof of willful and wanton injury (opinion, p. 2a of Appendix to Petition).

In *Stark* v. *Public Service Railway Co.*, 97 N. J. L. 297, 300, 117 Atl. 48, 49 (E. & A. 1922), the court defined the type of conduct which can be classified as willful or wanton:

> "To establish a willful or wanton injury it is necessary to show that one with knowledge of existing conditions, and conscious from such knowledge that injury will likely or probably result from his conduct, and with reckless indifference to the consequences, consciously and intentionally does some wrongful act or omits to discharge some duty which produces the injurious result. 29 *Cyc.* 569. There is no evidence in this case that the motorman of the car could see the truck upon the track and after such discovery with ample opportunity to stop his car before a collision would occur, deliberately failed to do so. There was therefore no evidence of willful or wanton injury which entitled the plaintiff to a submission of this question to the jury."

This definition was approved in *Evans* v. *Erie Railroad Co.*, 2 N. J. 243, 254, 148 A. 2d 130, 136 (1959).

The cases cited by plaintiff, do not whittle away the principle. *King* v. *Patryloiw*, 15 N. J. Super. 429, 433, 83 A. 2d 639, 641 (App. Div. 1941) refers to conduct in "known circumstances and the high degree of probability of producing the harm." The court in *Wegiel* v. *Hogan*, 28 N. J. Super. 144, 157, 100 A. 2d 349, 356 (App. Div. 1953) found "knowledge that injury would probably result" from the conduct.

In *Egan* v. *Erie Railroad Co.*, *supra*, the infant plaintiff, in an attempt to avoid the effect of the statute, alleged wanton conduct by the defendant where it had previous knowledge that children played upon the tracks. The court rejected that argument and said at p. 254 as reported in 29 N. J.:

> "The contention that the defendant's employees had 'actual notice' of the infant plaintiff's presence at the scene of the accident is not only unsupported but is expressly contradicted by the plaintiffs' own statement in their demand for admissions. This demand was that the defendant admit '[t]hat none of the crew observed the infant plaintiff, Catherine Egan, prior to the accident.' The defendant's affirmative answer was not rebutted, and at the oral argument plaintiffs' counsel conceded he had no proof to the contrary.
>
> [10-12] The claim of wanton negligence in the defendant's failure to have watchmen present at the scene at best supports an allegation of ordinary negligence. In essence, plaintiffs' claim is based upon the railroad's failure to take precautions against reasonably foreseeable harm to children coming upon the right of way after it had notice that children did so trespass.
>
> "To establish a willful or wanton injury it is necessary to show that one with knowledge of existing conditions, and conscious from such knowledge that injury will likely or probably result from his co-

> duct, and with reckless indifference to the consequences, consciously and intentionally does some wrongful act or omits to discharge some duty which produces the injurious result." *Staib* v. *Public Service Railway Co.*, 97 N. J. L. 297, 300, 117 A. 48, 49 (E. & A. 1922).

See also *King* v. *Petroglou*, 15 N. J. Super. 429, 83 A. 2d 639 (App. Div. 1951). Even ignoring the fact that in these circumstances a railroad is ordinarily under no duty to provide watchman, *Kaprol* v. *Central R. of New Jersey*, *supra*, its failure to do so falls far short of the standard required for a finding of willful or wanton conduct. Willfulness and wantonness are conclusions to be drawn from a given set of facts and circumstances. When in the light of common experience and judicial precedents the facts and circumstances alleged clearly do not constitute such conduct, the mere fact that plaintiffs characterize them as willful or wanton is not sufficient to create a triable issue. Summary judgment was properly entered for the defendant."

In the present case there was no evidence that the defendant railroad had knowledge that the alcoholics who congregated near the tracks actually went upon them. This plaintiff's position is therefore weaker than that of the plaintiff in the *Egan* case in that respect.

In the very recent case of *Frigi* v. *Kerrick*, Supreme Ct. of N. J. (A-149, not yet officially reported) decided January 23, 1961, Judge Francis, speaking for the New Jersey Supreme Court states at page 6 of the Official Opinion of the Court:

> "Consideration of a claim of unconstitutionality of a statute as transgressive of property rights and the command for equal protection of law must be engaged in with an awareness of the well-settled principle that a strong presumption of conformity to State and Fed-

eral organic charters attends the enactment. The person asserting such basic invalidity has the burden of overcoming the presumption. *Jamouneau* v. *Harner*, 16 N. J. 500, 515 (1954), cert. den. 349 U. S. 904, 99 L. Ed. 1241 (1955)."

For the foregoing reasons we submit respectfully that plaintiff's Point II does not set forth any valid ground for the granting of *certiorari* in this case.

(g)

Answer to Petitioner's Point III

It is probably a complete answer to plaintiff's Point III in which an attempt is made to attack the pertinent railroad trespasser statute on constitutional grounds, to point out that no attack on the statute on constitutional grounds was made by plaintiff in the trial court. This we believe is clear from reading the record of the pretrial conference, which appears at p. 9a of Pl's App. and also the various arguments of counsel and responses to the Court's questions and summary of plaintiff's contentions on the motion for judgment, which appear under the title "Colloquy" at p. 98a *et seq.* of Pl's App. We have made a careful reading of the record in this case, and we find no place therein where the plaintiff made any attack at the trial level on constitutional grounds. In the petition there is no reference to any place at the trial where plaintiff raised any constitutional question.

N.J.R.S. 48:12-152 quoted at length under the heading "Statute Involved" in this brief was recently under attack on several grounds in the New Jersey Supreme Court in *Egan* v. *Erie*, 29 N. J. 243 (1959). The validity of the statute was upheld on all grounds, including constitutional grounds by a unanimous court. In answer to the criticism of the statute on constitutional grounds, the New Jersey Supreme Court speaking through Proctor, J. said at pag[illegible]

"There is no question that the Legislature, subject to constitutional limitations, may fix the State's policy as to rules of conduct which result in liability or nonliability. *Collopy* v. *Newark Eye and Ear Infirmary*, 27 N. J. 29, 41 (1958); *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, 39 S. Ct. 227, 63 L. Ed. 527 (1919); *Shea* v. *Olson*, 185 Wash. 145, 53 P. 2d 615, 111 A.L.R. 998 (Sup. Ct. 1936). In such circumstances it is the duty of the court to apply the legislative will notwithstanding that it may conflict with the court's own philosophy. *Baadier* v. *Mascellino*, 116 N. J. Eq. 126 (E. & A. 1934). In the present instance the Legislature has solidified the common law in effect at the time of the enactment as it related to trespassers upon the rights of way of railroads. The declaration of a contrary rule on grounds of policy is a legislative rather than a judicial function. Cf. *Cohen* v. *Borough of Bradley Beach*, *supra*. That the courts have expanded the duties of landowners in other areas does not permit them to encroach upon a field where the Legislature has spoken.

Plaintiffs argue that the modification of the rules applicable to a landowner's common-law liability discussed above, has had the effect of leaving the statute isolated within our present body of law, with the result that the railroads are granted an immunity not possessed by other landowners. This, it is claimed, violates the equal protection clauses of the Federal and State Constitutions. Plaintiffs cite no authority, and we have found none, which supports the proposition that a statute applicable only to a specified class, which statute was valid when enacted, is subsequently rendered invalid by judicial determinations in cases not involving that class. Essentially the issue resolves itself into one of reasonableness of the legislative classification. A statute does not constitute a denial of equal protection of the laws merely because it extends to

some persons privileges denied to others, or imposes restrictions or liabilities on some but not on others. Such classifications do not render legislation unconstitutional if they are based on reasonable differences in the subject matter. *Guill* v. *Mayor and Council of City of Hoboken*, 21 N. J. 574 (1956); *Silver* v. *Silver*, 108 Conn. 371, 143 A. 240, 65 A.L.R. 943 (Sup. Ct. Err. 1922), affirmed 280 U. S. 117, 50 S. Ct. 57, 74 L. Ed. 221 (1929). Considering the importance of railroads as an instrument of transportation and commerce, the enormous territory encompassed by their rights of way, and the practical impossibility of adequately fencing or guarding them against trespassers, we cannot say that legislation relieving them from liability to trespassers while not so relieving other landowners is arbitrary or unreasonable. The great weight of authority throughout the country holds that even in the absence of a statute railroads are ordinarily under no duty to keep children from trespassing upon their rights of way or from boarding their cars. Annotations, 43 A.L.R. 38 (1926); 31 A.L.R. 2d 789 (1953). This result is predicated upon a realization that the difficulty of safeguarding the infant trespasser and the public interest in the effective operation of railroads outweigh the risk involved. *Nolley* v. *Chicago, M., St. P. & P. R. Co.* 183 F. 2d 566 (8 Cir. 1950), *certiorari* denied 340 U. S. 913, 71 S. Ct. 284, 95 L. Ed. 660 (1951); *Dugan* v. *Pennsylvania Railroad Company*, 387 Pa. 25, 127 A. 2d 343 (Sup. Ct. 1956), *certiorari* denied 353 U. S. 946, 77 S. Ct. 825, 1 L. Ed. 2d 856 (1957); see *Restatement, Torts*, Sec. 339(d); *Prosser, Torts*, (2d ed. 1955), Sec. 76, p. 444. Undoubtedly it was within the Legislature's province to make such a determination. We conclude that N. J. S. A. 48:12-152 is the result of and presently remains a reasonable classification by the Legislature and does not violate the equal protection clause of either the Federal or the State Constitution."

We submit that decision is sound in all respects, and petitioner's contention in Point III is without merit.

(h)

Reasons Why Petition Should Be Denied

On page 3 of the petition, under the heading "Reasons for Granting the Writ" it is stated: "There is a conflict of decision between the Court below, which has held that the petition was a trespasser, as a matter of law, where other Courts have held the railroad liable under similar circumstances." Petitioner then cites some rather old cases from Missouri, New Hampshire, Pennsylvania and South Carolina.

We submit respectfully this clearly is not a proper reason for *certiorari*. While this Court does grant *certiorari* where there is a conflict in the federal circuits in order to make federal law uniform, it certainly is not one of the duties of this Court to make the law of the several states uniform. This case is clearly governed by the law of New Jersey under the doctrine of *Erie* v. *Tompkins*, 302 U. S. 671, 58 S. Ct. 50 (1938), and therefore we submit the law of New Hampshire, Missouri and other states is clearly irrelevant.

We have answered Reason No. 2 in our answer to Point III. While we consider Reason No. 3 entirely without merit as a basis for granting *certiorari*, we might mention in passing that there is a good definition of wilful and wanton injury in the *Egan* case, *supra*, at page 254, as reported in 29 N. J.

Rule 19 of this Court which indicates the grounds usually considered in passing upon petitions for *certiorari*, is so familiar to the members of this Court that we refrain from setting it forth here. However, we submit that there is not present in this case one element covered by the rule, and in no part of the petition is any reference made to the rule. Frankly, we submit this is just not a proper case for *certio-*

rari. It is an unfortunate accident case, which to a large extent presented factual questions which were resolved by the trial judge. There is no unsettled principle of law in the case. The law of New Jersey applies, and that law is well settled. In fact, the recent case of *Egan* v. *Erie*, *supra*, alone settles practically all the legal questions in this matter. The objection that petitioner makes to the pertinent Railroad Trespassers' Statute on constitutional grounds is also well answered by Judge Proctor's decision in the *Egan* case.

We submit respectfully that petitioner has given no valid reason for granting *certiorari*, and the petition should be denied.

(i)

CONCLUSION

Respondent submits that petitioner has given no valid reason for granting certiorari in this case, and the petition should be denied.

Dated: January 26, 1961

Respectfully submitted,

James J. Langan,
Attorney for Respondent

Raymond J. Lamb,
Of Counsel.